UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

H&R BLOCK TAX SERVICES LLC,
a Missouri Limited Liability Company,

Plaintiff,

v.

JUDY STRAUSS,
a citizen of the State of New York,

Defendant.

C.A. No. 1:15-CV-0085 (LEK/CFH)

MEMORANDUM OF PLAINTIFF H&R BLOCK TAX SERVICES LLC IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. STATEMENT OF FACTS 3

III. ARGUMENT 7

A. Block Is Entitled To A Preliminary Injunction To Protect Its Goodwill And Client Relationships 7

1. Block Will Suffer Irreparable Harm In The Absence Of Injunctive Relief Because Ms. Strauss Will Be Able To Continue To Divert Clients Of Her Formerly Franchised Office To Her New Tax Business And To Cause Confusion Among H&R BLOCK Clients In The Cobleskill Area During The 2015 Tax Season 8

a. Unless Ms. Strauss Is Preliminarily Enjoined, Block Will Suffer Irreparable Harm Under Missouri Law 9

b. Unless Ms. Strauss Is Preliminarily Enjoined, Block Will Suffer Irreparable Harm Under New York Law 11

2. Block Is Likely To Succeed On The Merits Of Its Claims Because The Post-Termination Obligations At Issue Here Are Enforceable And Ms. Strauss Is Willfully Breaching Them 13

a. Ms. Strauss's Limited Covenant Against Competition Is Enforceable Under Missouri Law 13

b. Ms. Strauss's Limited Covenant Against Competition Is Enforceable Under New York Law 15

c. The Court's Injunction Should Encompass Employees Working In Active Concert With Ms. Strauss 17

3. The Balance Of Hardships Tips Decidedly In Favor Of Preliminary Relief Because The Injury Block Will Suffer In The Absence Of That Relief Is Incalculable And Irreparable 19

4. The Public Interest Favors The Enforcement Of Ms. Strauss's Contractual Obligations And The Avoidance Of Customer Confusion 19

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Federal Cases

Almontaser v. N.Y. City Dep't of Educ.,
519 F.3d 505 (2d Cir. 2008)....................7

Ayco Co., L.P. v. Frisch,
795 F. Supp. 2d 193 (N.D.N.Y. 2011)....................11, 12

BP Prods. N. Am. Inc. v. Motor Parkway Amoco,
No. 06-cv-0833, 2006 WL 6928862 (E.D.N.Y. Aug. 21, 2006) 12

Carvel Corp. v. Eisenberg,
692 F. Supp. 182 (S.D.N.Y. 1988) 16

DAR & Assocs., Inc. v. Uniforce Servs., Inc.,
37 F. Supp. 2d 192 (E.D.N.Y. 1999) 16

Ergowerx Int'l, LLC v. Maxell Corp. of Am.,
18 F. Supp. 3d 430 (S.D.N.Y. 2014) 8

Gilbert/Robinson, Inc. v. Carrie Beverage-Mo, Inc.,
758 F. Supp. 512 (E.D. Mo. 1991) 10

Gold v. Holiday Rent-A-Car Int'l, Inc.,
627 F. Supp. 280 (W.D. Mo. 1985) 15, 19

H&R Block Tax Servs., Inc. v. Peshel,
No. 05-cv-228, 2005 WL 361493 (D. Minn. Feb. 16, 2005)....................9, 10

H&R Block Tax Servs., Inc. v. Sheets,
No. 06-cv-23, 2006 U.S. Dist. LEXIS 8437 (E.D. Ky. Mar. 3, 2006)....................18

Marblelife, Inc. v. Stone Res., Inc.,
759 F. Supp. 2d 552 (E.D. Pa. 2010)....................10

Mullins v. City of N.Y.,
626 F.3d 47 (2d Cir. 2010)....................7

RESCUECOM Corp. v. Mathews,
No 5:05-cv-1330, 2006 WL 1742073 (N.D.N.Y. June 20, 2006) 12

Safety-Kleen Sys., Inc. v. Hennkens,
301 F.3d 931 (8th Cir. 2002) 8

ServiceMaster Residential/Commercial Servs. L.P. v. Westchester Cleaning Servs., Inc.,
No. 10-cv-2229, 2001 WL 396520 (S.D.N.Y. Apr. 19, 2001) 11

Sierra Club v. U.S. Army Corp. of Eng'rs,
645 F.3d 978, 997 (8th Cir. 2011) 19

Singas Famous Pizza Brands Corp. v. N.Y. Adver. LLC,
468 F. App'x 43 (2d Cir. 2012) 8, 11, 12, 16

Ticor Title Ins. Co. v. Cohen,
173 F.3d 63 (2d Cir. 1999)..12

Twentieth Century Fox Film Corp. v. Marvel Enters.,
220 F. Supp. 2d 289 (S.D.N.Y. 2002) 10

State Cases

AEE-EMF, Inc. v. Passmore,
906 S.W.2d 714 (Mo. Ct. App. 1995)..13, 14

Herrington v. Hall,
624 S.W.2d 148 (Mo. Ct. App. 1981)..13, 14

Klein, Wagner & Morris v. Lawrence A. Klein, P.C.,
186 A.D.2d 631 (N.Y. App. Div. 1992) 11

McCart v. H&R Block, Inc.,
470 N.E.2d 756 (Ind. Ct. App. 1984)..17, 18

Orchard Container Corp. v. Orchard,
601 S.W.2d 299 (Mo. Ct. App. 1980)..14

Osage Glass, Inc. v. Donovan,
693 S.W.2d 71 (Mo. 1985) 9

R.E. Harrington Inc. v. Frick,
428 S.W.2d 945 (Mo. Ct. App. 1968)..14

TKO Fleet Enters., Inc. v. Elite Limousine Plus, Inc.,
708 N.Y.S.2d 593 (N.Y. Sup. Ct. 2000) 17

Whelan Sec. Co. v. Kennebrew,
379 S.W.3d 835 (Mo. 2012) 13, 15

Willis of N.Y., Inc. v. DeFelice,
299 A.D.2d 240 (N.Y. App. Div. 2002) 11

Federal Rules

Fed. R. Civ. P. 65(d)(2)..17

I. INTRODUCTION AND SUMMARY

Plaintiff H&R Block Tax Services LLC ("Block") seeks preliminary injunctive relief restraining Defendant Judy Strauss, Block's former franchisee in Cobleskill, New York, from ongoing willful breaches of her post-termination obligations under her recently expired franchise agreement -- breaches that are causing substantial, immediate, and irreparable injury to Block's goodwill and client relationships in the Cobleskill area. Specifically, Block has moved that Ms. Strauss be preliminarily enjoined (1) from directly or indirectly offering tax return preparation services in or within 45 miles of Cobleskill, New York, (2) from soliciting clients of her former H&R BLOCK franchise, and (3) from continuing to use, and refusing to assign to Block, the telephone number listed under the name H&R BLOCK in Cobleskill.

When she entered into her franchise agreement, Ms. Strauss freely agreed to comply with these obligations when the agreement terminated. She then operated under and accepted the benefits of the franchise agreement in which these obligations were contained for 30 years. Moreover, when her franchise agreement recently terminated, she declined Block's repeated offers to enter into a new franchise agreement allowing her to continue as Block's franchisee in Cobleskill.

Nonetheless, Ms. Strauss has now chosen to breach her commitments (1) by continuing, despite the termination of her franchise agreement, to offer tax return preparation services, through the same tax preparers and at the same location at which she previously operated her franchised H&R BLOCK office, (2) by soliciting clients of the former H&R BLOCK franchise, and (3) by continuing to use the telephone number listed under the H&R BLOCK name in Cobleskill to do so. The injury to Block from Ms. Strauss's contractual breaches is by its nature irreparable and will impact Block most severely during the next three months (*i.e.*, between now and April 15, 2015) -- the period during which most income tax returns for the 2014 tax year will be filed. Preliminary relief is therefore necessary.

Block is highly likely to succeed on the merits of its claims that Ms. Strauss is breaching her post-termination contractual obligations. The contractual restrictions to which she agreed are limited, reasonable, and straightforward, and there is no genuine issue that she is evading them. Her intention to unfairly trade on the goodwill of the H&R BLOCK brand is underscored by her refusal to surrender the telephone number listed in the Cobleskill area under the H&R BLOCK name and her continued operation of her tax business through tax preparers who formerly worked in the Cobleskill H&R BLOCK office.[1]

Moreover, the harm that Block is already suffering, and will continue to suffer in the absence of preliminary injunctive relief, is substantial, immediate, and irreparable. Ms. Strauss and her employees in her formerly franchised H&R BLOCK office in Cobleskill have for 30 years been the primary contacts for taxpayers in the area with the H&R BLOCK brand. During the 2014 tax season, Ms. Strauss's franchised H&R BLOCK office prepared almost 2,500 tax returns. As Ms. Strauss is well aware, her continuation of a tax return preparation business at the site of her former H&R BLOCK office in Cobleskill and her continued use of the same tax return preparers and telephone number that have become associated with the H&R BLOCK brand in that area will be powerful tools in her attempt to solicit and divert clients who have previously used H&R BLOCK tax return preparation services away from the new H&R BLOCK office that has now opened in Cobleskill. To the extent she is successful over the next three months in diverting H&R BLOCK clients away from that new H&R BLOCK office and to her contractually prohibited independent tax business in Cobleskill, it will be very difficult for the H&R BLOCK brand to win those clients back, and the harm to Block's goodwill and client relationships in the area will be incalculable and irreparable.

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[1] Under her franchise agreement, Ms. Strauss was required to obtain agreements from those tax preparers not to compete with the H&R BLOCK brand. Last year, she deliberately failed to do so.

The balance of hardships here also weighs heavily in favor of preliminary injunctive relief. To the extent that Ms. Strauss will suffer any hardship as the result of the preliminary injunction requested, she agreed to those terms as conditions of her entry into the franchise agreement from which she has benefitted for 30 years, and she declined Block's offers of a new franchise agreement under which she could have continued as Block's franchisee at her formerly franchised location for at least another 10 years. Moreover, if Ms. Strauss were to suffer any cognizable loss as the result of the entry of the requested preliminary injunction (which appears unlikely), it would be a loss that would be compensable in money damages, whereas the harm to Block's goodwill and client relationships if a preliminary injunction is not entered will be irreparable.

Finally, the public interest favors enforcement of valid contractual obligations. It is also in the public interest to avoid the inevitable confusion (and the opportunity for obstruction, particularly in these circumstances) caused by the use in the middle of the tax season of a telephone number listed in Cobleskill under the H&R BLOCK name by a business in that area that is no longer associated with the H&R BLOCK brand.

II. STATEMENT OF FACTS

In September 1984, Ms. Strauss entered into a Satellite Franchise Agreement (the "SFA") with Block's predecessor-in-interest. Declaration of Todd Bernhardt ("Bernhardt Dec.") ¶ 3. (A copy of the SFA is attached to the Bernhardt Dec. as Exhibit A.) Under the SFA, Ms. Strauss was granted the exclusive right to operate a tax return preparation office in Cobleskill, New York under the H&R BLOCK service mark and using proprietary methods and procedures developed for H&R BLOCK offices.

Ms. Strauss agreed in the SFA that when her franchise relationship terminated, she would take steps designed to enable Block to retain the goodwill that had been developed in her formerly franchised territory under the H&R BLOCK mark. Those steps included, among others, refraining for one year from directly or indirectly offering tax return preparation services in or within 45 miles of Cobleskill, New York, refraining for one year from soliciting clients of her former H&R BLOCK franchise, and assigning to Block the telephone number listed in Cobleskill under the H&R BLOCK name. Ex. A to Bernhardt Dec. ¶¶ 12(a)(ii)-(iii), 14. Ms. Strauss acknowledged that these restrictions were fair and reasonable and that they would be enforceable by injunctive relief in the event of a breach. *Id.* ¶ 12(d). Ms. Strauss further agreed that for a period of one year following termination of the SFA, she would not lease the premises of her formerly franchised H&R BLOCK office to any person (other than Block or a transferee approved by Block) for the purpose of conducting a tax return preparation business. *Id.* ¶ 14.

In addition, Ms. Strauss agreed that upon the termination of the SFA, she would refrain from using, directly or indirectly, any of Block's trademarks and service marks and from holding herself out to the public as in any way affiliated or connected with Block. *Id.* To that end, Ms. Strauss agreed to distinguish her business from that of Block sufficiently to avoid any possibility of client confusion. *Id.* She also agreed never to divulge to or use for the benefit of any person outside the H&R BLOCK organization any information regarding clients of her H&R BLOCK franchised office or to do any deliberate act prejudicial or injurious to the goodwill or name of Block. *Id.* ¶ 12(b)(i) & (iii). In the SFA, Ms. Strauss also agreed to cause each person employed by her to prepare tax returns or to supervise the preparation of tax returns at her H&R BLOCK office to enter into an agreement containing substantially the same covenants against competition and disclosure as those contained in the SFA. *Id.* ¶ 12(g).

When expiration of the most recent term of the SFA was approaching, Block advised Ms. Strauss that it would not again agree to renewal of her 1984 form of franchise agreement, but that it would be happy to enter into Block's current form of franchise agreement under which she would have the right to remain the H&R BLOCK franchisee in Cobleskill for at least another 10 years.

Bernhardt Dec. ¶ 4. Ms. Strauss emphatically declined the opportunity to continue her H&R BLOCK franchise under Block's current form of franchise agreement. *Id.* ¶ 5. Thus, her rights under the SFA terminated on September 1, 2014. *Id.*

As the 2015 tax preparation season was approaching, Block reminded Ms. Strauss of her post-termination obligations under the SFA, including, but not limited to, her obligations to (1) refrain for one year from soliciting or diverting from Block any client for whom her franchised office prepared a tax return or provided related services; (2) refrain for one year from competing with Block or its franchisees in the tax return preparation business within 45 miles of Cobleskill; and (3) assign to Block the telephone number she had used in connection with her H&R BLOCK business. *Id.* ¶ 7. Block also reminded Ms. Strauss that she had been required to have each of her employees who prepared tax returns sign an employment agreement that prohibited the employee from competing with Block for one year following the termination of the SFA and requested that she forward to Block copies of those agreements. *Id.*

To date, Ms. Strauss has failed and refused to comply with those post-termination obligations. Specifically, she has continued to operate a tax return preparation business at her formerly franchised H&R BLOCK location under the name J. STRAUSS & ASSOCIATES. A sign posted on the exterior of her office states "J. STRAUSS & ASSOCIATES BOOKKEEPING & TAX SERVICE." Declaration of Donna Chow ("Chow Dec.") ¶ 7. In addition, tax return preparation services are continuing to be offered at that location by tax professionals who were previously employed by Ms. Strauss in her franchised H&R BLOCK office, and the telephone number listed to H&R BLOCK in the local directory continues to ring in her formerly franchised office. *Id.* ¶¶ 4, 9. Although Block has repeatedly requested that Ms. Strauss assign the H&R BLOCK telephone number in Cobleskill to Block, she has failed and refused to comply with that request. Ms. Strauss is also currently running print advertising directed at clients of her former H&R

BLOCK franchise, promoting tax preparation services available in her new office during the upcoming tax season. *Id.* ¶ 8; Exs. B, C.

In emails sent to Block in late December 2014, Ms. Strauss stated that she had agreed to lease space in her previously franchised office to two tax professionals whom she had previously employed at that office and that those individuals would continue to perform tax return preparation services at that office. Bernhardt Dec. ¶¶ 8-9. In addition, although Ms. Strauss was required under the SFA to obtain agreements from the tax professionals who worked in her franchised office not to compete with Block, she informed Block that she had in recent years stopped complying with that obligation. *Id.*

On January 8, 2015, Block advised Ms. Strauss that her leasing space at her formerly franchised location to her former tax professionals for the purpose of providing tax return preparation services would also constitute a breach of her post-termination obligations under the SFA. *Id.* ¶ 10. Block further advised Ms. Strauss that, if she were concerned about the employment opportunities of her former tax preparers, Block would be willing to hire any of her former tax professionals who would be interested in working for Block. *Id.* Also on January 8, 2015, Block informed Ms. Strauss that, owing to her long relationship with Block and in the hope of avoiding any unnecessary litigation, Block would be willing to purchase her formerly franchised business. *Id.* ¶ 11. Ms. Strauss declined that offer the same day. *Id.*

Nevertheless, tax preparers working in Ms. Strauss's former H&R BLOCK office have recently told former clients of that office that tax return preparation services will be offered from that location during the recently commenced 2015 tax season. Chow Dec. ¶ 3. In addition, tax preparers working at that location are actively scheduling appointments with clients for the purpose of providing such services. *Id.* ¶¶ 4-5. There is reason to believe that Ms. Strauss and the other tax preparers working in her office are not regularly informing clients that the office is no longer associated with Block. *Id.* ¶ 5.

In the Fall of 2014, an affiliate of Block opened a new H&R BLOCK office in Cobleskill in order to provide services to former H&R BLOCK clients in that area and retain the goodwill that had been developed under the H&R BLOCK mark. *Id.* ¶ 3. At that time, Block contacted each of the tax preparers who had previously been employed by Ms. Strauss in her H&R BLOCK franchised office in order to offer them employment in its new office. *Id.* ¶ 10. Each of those tax preparers declined Block's offer and indicated that they intended to continue their employment with Ms. Strauss and to prepare tax returns at her office. *Id.* Tax preparers from Ms. Strauss's office have since visited the new H&R BLOCK office in Cobleskill on multiple occasions. *Id.* ¶ 9. They have openly stated that they are preparing tax returns at Ms. Strauss's office and have demanded that the new H&R BLOCK office direct any former clients of Ms. Strauss's H&R BLOCK franchise back to them. *Id.*[2]

III. ARGUMENT

A. Block Is Entitled To A Preliminary Injunction To Protect Its Goodwill And Client Relationships.

A district court has wide discretion in determining whether to grant a preliminary injunction. *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008). To obtain a preliminary injunction in this Circuit, "a movant must demonstrate (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff[']s favor;

[2] Block has submitted declarations in support of its motion for a preliminary injunction, part of which contain hearsay. The Second Circuit has determined that such evidence may be considered by a district court in determining whether to grant a preliminary injunction. *See Mullins v. City of N.Y.*, 626 F.3d 47, 52 (2d Cir. 2010) (concluding that "[t]he admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage" because "[t]o hold otherwise would be at odds with the summary nature of the remedy and would undermine the ability of courts to provide timely provisional relief").

and (3) that the public's interest weighs in favor of granting an injunction." *Singas Famous Pizza Brands Corp. v. N.Y. Adver. LLC*, 468 F. App'x 43, 45 (2d Cir. 2012) (quoting *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010)). Because Block has established each of these factors, preliminary injunctive relief should be granted here.[3]

1. Block Will Suffer Irreparable Harm In The Absence Of Injunctive Relief Because Ms. Strauss Will Be Able To Continue To Divert Clients Of Her Formerly Franchised Office To Her New Tax Business And To Cause Confusion Among H&R BLOCK Clients In The Cobleskill Area During The 2015 Tax Season.

Delay in the enforcement of Ms. Strauss's post-termination obligations would result in substantial and irreparable harm to Block's client relationships, its goodwill, and its ability to re-establish an H&R BLOCK tax return preparation office in the Cobleskill area. The 2015 tax season is already underway, and Ms. Strauss is continuing to operate a tax return preparation business at the location of her formerly franchised H&R BLOCK office. Chow Dec. ¶ 11. She is also actively advertising her office's tax return preparation services. *Id.* ¶ 8. Her breach of her agreement to refrain from operating such an office and from soliciting clients of her former franchise, and her continued use of the telephone number associated with her former H&R BLOCK office, has already caused and will continue to cause significant confusion among H&R BLOCK clients as the tax season progresses. Moreover, Ms. Strauss's ability to trade on client information and relationships developed under the H&R BLOCK mark gives her an unfair opportunity to identify, solicit, and service H&R BLOCK clients. *Id.* ¶ 11. Accordingly, a preliminary injunction is necessary to protect Block from ongoing irreparable harm to its goodwill, client relationships, and ability to re-establish a viable H&R BLOCK tax return preparation office in Cobleskill.

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[3] While the standard for issuance of a preliminary injunction is a matter of federal law, determining whether the plaintiff has a reasonable likelihood of success on the merits or will suffer irreparable harm in the absence of injunctive relief requires application of the relevant state law to the underlying facts. *See Safety-Kleen Sys., Inc. v. Hennkens*, 301 F.3d 931, 935 (8th Cir. 2002) ("Because this is a diversity case, we look to Missouri law for the proper irreparable injury standard."). Paragraph 25 of the SFA specifies that the contract is governed by Missouri law. Ex. A to Bernhardt Dec. ¶ 25. "New York courts will generally 'enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction.'" *Ergowerx Int'l, LLC v. Maxell Corp. of Am.*, 18 F. Supp. 3d 430, 439 n.5 (S.D.N.Y. 2014) (quoting *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500 (N.Y. 2006)). Block is a Missouri limited liability company, and Missouri law therefore bears a reasonable relationship to the parties and should be applied to determine both whether Block has a reasonable likelihood of success on the merits of its claims and whether it will suffer irreparable harm in the absence of injunctive relief. However, the outcome would be the same if New York law were applied.

a. Unless Ms. Strauss Is Preliminarily Enjoined, Block Will Suffer Irreparable Harm Under Missouri Law.

Under Missouri law, a party suffers irreparable harm when its customers are the target of active conversion by the party to be restrained. *See Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 75 (Mo. 1985) ("The purpose of the restriction is to keep the covenanting employee out of a situation in which he might be able to make use of contacts with customers to his former employer's disadvantage. If the covenant is lawful and the opportunity for influencing customers exists, enforcement is appropriate."); *see also H&R Block Tax Servs., Inc. v. Peshel*, No. 05-cv-228, 2005 WL 361493, at *3 (D. Minn. Feb. 16, 2005) ("Under Missouri law, irreparable injury occurs when an employee uses his experience gained from an employer in violation of a reasonable covenant not to compete.").

In the present case, Ms. Strauss's H&R BLOCK franchised office prepared nearly 2,500 tax returns during last year's tax season (Bernhardt Dec. ¶ 6), and Block's new office in Cobleskill stands to lose those clients in the event that she is not immediately enjoined from breach of her covenants not to compete there. The tax return preparation business is characterized by the development of long-term relationships between clients and their tax preparers. Ms. Strauss operated her H&R BLOCK franchise in Cobleskill for 30 years, during which time she was able to develop relationships with clients attracted by the H&R BLOCK mark, and the public came to know her and her employees as H&R BLOCK tax return preparers. If the new H&R BLOCK office in

Cobleskill does not have an opportunity over the next three months to re-establish the relationship between the H&R BLOCK brand and the clients serviced by the previous H&R BLOCK office there, it will be unlikely to be able to do so in the future. Chow Dec. ¶ 11; *see Peshel*, 2005 WL 361493, at *4 ("H&R Block faces irreparable harm if Peshel is allowed to ignore her obligations because she will appropriate goodwill that belongs to H&R Block. She and her employees were the only individuals affiliated with H&R Block that most clients in the Ely area knew. She developed close relationships with those clients while preparing their tax returns. Because H&R Block risks losing those relationships due to Peshel's violation of the Agreement, H&R Block has shown irreparable harm.").[4]

The irreparable harm Block is suffering is exacerbated by the fact that, owing to Ms. Strauss's ongoing breach of her agreement, the telephone number associated with H&R BLOCK in Cobleskill continues to ring in her now independent office. *See Marblelife, Inc. v. Stone Res., Inc.*, 759 F. Supp. 2d 552, 562 (E.D. Pa. 2010) ("[W]here a former franchisee continues to use telephone numbers it used as [a] franchisee and agreed to relinquish or transfer upon termination, the franchisee is not only in breach of the franchise contract but also poses a serious threat of irreparable injury."). Block has already learned of several instances of client confusion that have arisen as a

[4] Ms. Strauss may assert that the clients who patronized her H&R BLOCK office are "her" clients and that therefore she can continue to service them. However, Ms. Strauss did business under the H&R BLOCK marks and with the advantages of the H&R BLOCK system of operation for 30 years, and it is a central premise of trademark law that goodwill generated under a licensed service mark inures to the benefit of the mark's owner. *See, e.g.*, *Twentieth Century Fox Film Corp. v. Marvel Enters.*, 220 F. Supp. 2d 289, 294 (S.D.N.Y. 2002) (reciting the "basic tenet of trademark licensing law . . . that when the goodwill associated with a trademark has not been transferred from a licensor to licensee, any goodwill developed by the licensee through its use of the mark inures solely to the benefit of the licensor"); *Gilbert/Robinson, Inc. v. Carrie Beverage-Mo, Inc.*, 758 F. Supp. 512, 528 (E.D. Mo. 1991) (stating that because the plaintiff was the owner of the federal service mark registrations of Houlihan's restaurants, the use of the marks by the plaintiff's subsidiaries and licensees inured to the benefit of the plaintiff). Ms. Strauss also agreed in the SFA that all uses of Block's marks would inure to the benefit of Block. Ex. A to Bernhardt Dec. ¶ 3.

result (Chow Dec. ¶¶ 3-5), and these instances will multiply unless and until Ms. Strauss is ordered to comply with her contractual obligations.

b. Unless Ms. Strauss Is Preliminarily Enjoined, Block Will Suffer Irreparable Harm Under New York Law.

Under New York law, irreparable injury in the context of a motion for a preliminary injunction "means any injury for which money damages are insufficient." *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (N.Y. App. Div. 1992). New York courts have recognized that a plaintiff establishes irreparable harm when in the absence of a preliminary injunction, it will suffer a loss of business that is "impossible, or very difficult, to quantify." *Willis of N.Y., Inc. v. DeFelice*, 299 A.D.2d 240, 242 (N.Y. App. Div. 2002). "Generally, when a party violates a [reasonable] non-compete clause, the resulting loss of client relationships and customer good will built up over the years constitutes irreparable harm for purposes of imposing a preliminary injunction." *Singas*, 468 F. App'x at 46 (alteration in original) (citation and internal quotation marks omitted); *see also Ayco Co., L.P. v. Frisch*, 795 F. Supp. 2d 193, 205 (N.D.N.Y. 2011) (same).

As shown above, the facts of this case strongly support a finding that without a preliminary injunction enforcing Ms. Strauss's post-termination covenants for a relatively short period in Cobleskill, Block will continue to suffer incalculable harm to its goodwill. Under New York law, "[t]here is a recognized danger that former franchisees will use the knowledge that they have gained from the franchisor to serve its former customers, and that continued operation under a different name may confuse customers and thereby damage the goodwill of the franchisor." *ServiceMaster Residential/Commercial Servs. L.P. v. Westchester Cleaning Servs., Inc.*, No. 10-cv-2229, 2001 WL 396520, at *3 (S.D.N.Y. Apr. 19, 2001). Monetary damages are insufficient to compensate for that kind of loss, as it is "very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999).

As discussed above, the likelihood that Block is suffering irreparable harm is even stronger here, where Ms. Strauss continues to offer tax return preparation services from the same location at which she previously operated her franchised H&R BLOCK office. *See BP Prods. N. Am. Inc. v. Motor Parkway Amoco*, No. 06-cv-0833, 2006 WL 6928862, at *5 (E.D.N.Y. Aug. 21, 2006) (finding that the goodwill and reputation of a franchisor were harmed by, among other things, the fact that the defendant's new business operated out of the same location as the former franchisee). Proof of attempts to solicit returning customers is also sufficient to establish irreparable harm under New York law. *RESCUECOM Corp. v. Mathews*, No 5:05-cv-1330, 2006 WL 1742073, at *2 (N.D.N.Y. June 20, 2006) (finding that solicitation of customers by a former franchisee operating a competing business out of the same location prevented the franchisor from transferring those customers to a different franchise in the area).

Finally, Ms. Strauss expressly agreed in the SFA that the limited post-termination obligations contained in the agreement were "reasonably required for the protection of the interests of Block, its franchisees, and their respective clients," and that the restrictions would be enforceable by injunctive relief. Ex. A to Bernhardt Dec. ¶ 12(d). The Second Circuit has held that "a defendant's agreement to such contractual provisions might arguably be viewed as an admission . . . that plaintiff will suffer irreparable harm were [defendant] to breach the contract's non-compete provision." *Singas*, 468 F. App'x at 46 (alterations in original) (citation and internal quotation marks omitted); *see also Ayco Co., L.P.*, 795 F. Supp. 2d at 205 (same). Thus, a finding of irreparable harm in this case is reinforced by Ms. Strauss's acknowledgment of that fact in the SFA.

2. Block Is Likely To Succeed On The Merits Of Its Claims Because The Post-Termination Obligations At Issue Here Are Enforceable And Ms. Strauss Is Willfully Breaching Them.

By this motion, Block seeks to enforce three of Ms. Strauss's post-termination obligations under the SFA: (1) her obligation to discontinue using, and to assign to Block, the telephone number associated with her former H&R BLOCK franchised office; (2) her obligation to refrain from directly or indirectly competing with Block in the Cobleskill area for a period of one year; and (3) her obligation not to solicit clients of her former H&R BLOCK franchise.

First, there can be little question that a contractual requirement that a former franchisee cease use of a telephone number listed under the franchisor's service mark and assign that telephone number to the franchisor is valid and enforceable. Moreover, there is no dispute that Ms. Strauss has willfully refused to comply with that obligation. Second, the limited restrictions on solicitation of former H&R BLOCK clients and on Ms. Strauss's tax return preparation activity -- one year (*i.e.*, one tax season) within 45 miles of Cobleskill -- are reasonable and fully enforceable under both Missouri and New York law, and the facts here show that they too are being willfully breached.

a. Ms. Strauss's Limited Covenant Against Competition Is Enforceable Under Missouri Law.

Missouri law recognizes the validity of covenants not to compete provided that they are reasonable, meaning that they are "no more restrictive than is necessary to protect the legitimate interests of the employer." *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 841 (Mo. 2012) (en banc); *see also Herrington v. Hall*, 624 S.W.2d 148, 151 (Mo. Ct. App. 1981) ("A temporally and spatially limited restraint may be deemed reasonable and enforceable in equity if a legitimate protectable interest of the employer is served." (citation omitted)). Restrictive covenants "must be reasonable as to time and space." *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714, 719 (Mo. Ct. App. 1995). The reasonableness of time and geographic restrictions is determined according to the facts of the case and requires a consideration "of all surrounding circumstances, including the subject matter of the contract, the purpose to be served, the situation of the parties, the extent of the restraint, and the specialization of the business." *R.E. Harrington Inc. v. Frick*, 428 S.W.2d 945, 950 (Mo. Ct. App. 1968).

In *AEE-EMF Inc.*, the Missouri Court of Appeals explained that customer contacts are considered a protectable interest because the goodwill that is established from the contacts between the company and the customer results in sales of the company's product or services. 906 S.W.2d at 720. The reasonableness of a geographic limitation also depends on customer contacts, *i.e.*, whether the employer, for example, has customers "located co-extensively with those geographic limits." *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980). Similarly, the duration of a noncompetition clause is reasonable if it does not "exceed that period during which the covenantee' s goodwill is subject to appropriation by the covenantor." *AEE-EMF, Inc.*, 906 S.W.2d at 723 (citation omitted).

Missouri courts have enforced covenants against competition in the franchise setting as well as the employment setting. In *Herrington*, the court enforced a covenant not to compete contained in an agreement between the owner of a service station and an independent contractor whom the owner hired to manage his service station. While recognizing that the case differed from that in which an employer seeks to enforce a noncompetition provision against a former employee, the court enforced the covenant contained in the agreement, finding that, "[a]s a general proposition, non-compete covenants ancillary to franchise agreements are enforceable if reasonable and consistent with public policy." 624 S.W.2d at 152.

The noncompetition provision that Block seeks to enforce here is reasonable and narrowly tailored.[5] The geographic restriction, encompassing an area of 45 miles from Cobleskill, is not unreasonable for the rural area involved because H&R BLOCK clients are located "co-extensively" with that radius. Moreover, Ms. Strauss is operating her new tax business not outside of Cobleskill, but at the same location in Cobleskill at which she previously operated her H&R BLOCK franchised office.

The one year time restriction in the SFA's covenant not to compete is also reasonable. Because the goodwill attached to the H&R BLOCK mark has been developed over many years in the Cobleskill area, it will be highly vulnerable to misappropriation by Ms. Strauss during the current tax season and for at least the next year. *See Gold v. Holiday Rent-A-Car Int'l, Inc.*, 627 F. Supp. 280, 285 (W.D. Mo. 1985) (upholding a covenant not to compete applicable within a 75-mile radius of the licensed area and for a period of two years following the termination of a rental car franchise under both Missouri and Florida law and requiring the licensee to transfer to the franchisor all telephone numbers used in connection with advertising the franchised business); *see also Whelan Sec. Co.*, 379 S.W.3d at 846-47 (enforcing a noncompetition clause in an employment contract that prohibited the employee from working for a competing business within 50 miles of his place of employment for a period of two years).

In sum, Block is likely to succeed on its claim that Ms. Strauss is breaching her commitments not to solicit clients of her former H&R BLOCK franchise and not to compete with Block in the Cobleskill area.

b. Ms. Strauss's Limited Covenant Against Competition Is Enforceable Under New York Law.

Under New York law, courts analyze the enforceability of restrictive covenants contained in ordinary commercial contracts, such as franchise agreements, under a rule of reason test, balancing

[5] Indeed, Ms. Strauss expressly acknowledged the reasonableness of the covenant's restrictions in Section 12(d) of the SFA. Bernhardt Dec. (Ex. A) ¶ 12(d).

the competing public policies in favor of robust competition and freedom to contract. *DAR & Assocs., Inc. v. Uniforce Servs., Inc.*, 37 F. Supp. 2d 192, 197 (E.D.N.Y. 1999). In applying the rule of reason test, courts consider: (1) whether the plaintiff has demonstrated a legitimate business interest that warrants the enforcement of the restrictive covenant; (2) the reasonableness of the covenant with respect to geographic scope and temporal duration; and (3) the degree of hardship that enforcing the covenant would inflict upon the defendant, bearing in mind the degree to which the defendant consciously agreed to bear the risk of such hardship when it entered into the agreement. *Id*.

The noncompetition provision in the SFA fully satisfies this standard. First, Block has a legitimate interest in protecting its goodwill and client relationships from misappropriation by Ms. Strauss. In addition, the temporal and geographic components of the noncompete provision at issue here are reasonable in light of Block's attempt to establish a new H&R BLOCK office in Cobleskill during the current tax season and to retain the clients and goodwill previously developed there under the H&R BLOCK mark. Courts applying New York law have not hesitated to enforce geographic and temporal restrictions comparable to those in the SFA. *See, e.g.*, *Singas*, 468 F. App'x at 46-47 (affirming the district court's ruling sustaining the reasonableness of a restrictive covenant that prohibited a former pizza store franchisee from engaging in "the Italian food service business" within 10 miles of the franchisee's former location for a two-year period on the grounds that the restrictions were reasonably calculated to further the franchisor's legitimate interests in protecting its knowledge and reputation as well as its goodwill); *DAR & Assocs., Inc.*, 37 F. Supp.2d at 199 (upholding a provision restricting a former licensee of a professional staffing business from competing within 50 miles of its former place of business for one year); *Carvel Corp. v. Eisenberg*, 692 F. Supp. 182, 186 (S.D.N.Y. 1988) (upholding a provision limiting the former franchisees' ability to operate an ice cream store within two miles of their franchised location for three years);

TKO Fleet Enters., Inc. v. Elite Limousine Plus, Inc., 708 N.Y.S.2d 593, 596 (N.Y. Sup. Ct. 2000) (upholding a provision restricting a former limousine franchisee from competing within 50 miles of Times Square for one year).

Moreover, any hardship Ms. Strauss faces is overshadowed by the fact that she specifically agreed to bear the risk of that hardship when she entered into the SFA. She was aware of the restrictive covenant contained in the SFA, yet voluntarily entered into the contract and accepted its benefits for 30 years. For all of these reasons, the nonsolicitation and noncompetition covenants to which Ms. Strauss willingly agreed are likely to be found enforceable against her.

c. The Court's Injunction Should Encompass Employees Working In Active Concert With Ms. Strauss.

Block anticipates that Ms. Strauss may argue that she is not herself engaging in tax return preparation services and that she has merely allowed some of the tax professionals employed by her former H&R BLOCK franchise to perform those services in her now independent office. Even apart from the inherent implausibility of that argument, the Court's injunction should reach tax preparers working out of Ms. Strauss's office. Fed. R. Civ. P. 65(d)(2).

Courts have routinely enforced covenants not to compete against third parties that act in concert with a former franchisee to circumvent the franchisee's contractual obligations. For example, in *McCart v. H&R Block, Inc.*, 470 N.E.2d 756 (Ind. Ct. App. 1984), Block brought suit to enjoin a former franchisee's husband from violating the restrictive covenant contained in his wife's franchise agreement. The franchisee had notified Block that she no longer wished to continue as a franchisee. *Id.* at 759. Immediately after terminating her franchise agreement, the franchisee notified her previous customers that in the future she planned to assist her husband in his own tax preparation business at the same location as her former franchise. *Id.* As in the present case, Block opened a new tax return preparation office not far from their location, and clients intending to reach that new H&R BLOCK office would sometimes inadvertently call the husband's office to make an appointment. *Id.*

The trial court granted a preliminary injunction against both the franchisee and her husband to prevent them from operating the competing tax preparation business, and that decision was affirmed on appeal. The appellate court ultimately rejected the husband's contention that the outcome was controlled by the existence or nonexistence of a contractual relationship between him and Block. *Id.* at 762. Instead, the court concluded that the husband was properly included within the scope of the trial court's injunction because an order enjoining only the wife from opening a competing business would have "ignor[ed] the business realities of the situation [and] frustrate[ed] the [intended] purpose" of the noncompete provision. *Id.*; *see also H&R Block Tax Servs., Inc. v. Sheets*, No. 06-cv-23, 2006 U.S. Dist. LEXIS 8437, at *25-29 (E.D. Ky. Mar. 3, 2006) (applying Missouri law and enjoining a franchisee's successor from preparing tax returns for former customers of the franchise where the successor's operations were taking place in the same location as the former franchise; one of the phone numbers formerly assigned to the franchise was being used by the successor; and the successor's employees were all employees of the former franchise).

Moreover, Ms. Strauss deliberately breached her obligation under the SFA to obtain protection for Block from these employees as part of her premeditated scheme to wrongfully compete with Block. Finally, it is simply not credible that the tax return business run out of Ms. Strauss's office is occurring without her active assistance. As in *McCart* and *Sheets*, these tax preparers working out of Ms. Strauss's office are involved in a coordinated scheme constructed by Ms. Strauss to evade her contractual obligations. In order to grant Block effective relief under these circumstances, the tax preparers working from Ms. Strauss's former H&R BLOCK office must be subject to the Court's preliminary injunction as well.

3. The Balance Of Hardships Tips Decidedly In Favor Of Preliminary Relief Because The Injury Block Will Suffer In The Absence Of That Relief Is Incalculable And Irreparable.

The harm to Block from Ms. Strauss's continued operation of a tax return preparation business in Cobleskill and her solicitation of H&R BLOCK clients substantially outweighs any cognizable harm Ms. Strauss may suffer from the entry of the preliminary injunction requested. Any hardship that enforcing Ms. Strauss's contractual obligations would inflict upon Ms. Strauss is entitled to little weight in light of her acceptance of those obligations when she entered into the SFA. Ms. Strauss received the benefit of her bargain through her ability to trade on the goodwill of the H&R BLOCK name and Block's proprietary information and systems of operation over the past 30 years. She cannot now deprive Block of a critical benefit of its bargain by using the advantages she gained as an H&R BLOCK franchisee to compete directly against Block in the same market. Moreover, any harm to Ms. Strauss from a preliminary injunction would be self-inflicted and cannot be deemed irreparable as a matter of law. *See, e.g.*, *Sierra Club v. U.S. Army Corp. of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (affirming the district court's conclusion that the balance of harms weighed in favor of the plaintiff on the grounds that the defendant's harm was "largely self inflicted"). Furthermore, Ms. Strauss will not be unemployed for the period of the injunction. She has for many years operated, and during the period for which she is preliminarily enjoined will continue to operate, a separate accounting business.

4. The Public Interest Favors The Enforcement Of Ms. Strauss's Contractual Obligations And The Avoidance Of Customer Confusion.

Finally, "[t]he public has an interest in enforcing covenants not to compete contained within valid contracts as long as the covenant is reasonably limited in scope, duration, and geographic region." *Gold*, 627 F. Supp. at 285 (citing *Sigma Chem. Co. v. Harris*, 586 F. Supp. 704, 711 (W.D. Mo. 1984)). The preliminary injunction requested here also will reduce confusion among H&R

BLOCK clients seeking tax preparation services in the Cobleskill area during the current tax season. Thus, the preliminary injunction requested would serve the public interest under both Missouri and New York law.

IV. CONCLUSION

For the foregoing reasons, Block requests that the Court grant its Motion for a Preliminary Injunction and enter an Order requiring Ms. Strauss and all those acting in concert or participation with her to (1) refrain from directly or indirectly offering tax return preparation and related services in or within 45 miles of Cobleskill, New York, (2) refrain from solicitation of clients of the former H&R BLOCK office in Cobleskill; and (3) discontinue using, and assign to Block, the telephone number(s) associated with her former H&R BLOCK business.

Respectfully submitted,

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s/Paul M. Freeman

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